

STATE OF MICHIGAN
COURT OF APPEALS

ROBIN H. BERRYHILL,

Plaintiff-Appellant,

v

GRATIOT CONSERVATION DISTRICT,

Defendant-Appellee.

UNPUBLISHED

August 24, 2004

No. 248217

Gratiot Circuit Court

LC No. 02-007374-CZ

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals of right from the trial court's judgment of no cause of action on plaintiff's claim for alleged violations of the Open Meetings Act (OMA), MCL 15.261 *et seq.*, and from the court's order granting defendant summary disposition on plaintiff's Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, claim. We reverse and remand for trial on the WPA claim. We affirm the trial court's judgment on the OMA claim.

This case arose when defendant hired plaintiff pursuant to a grant from the Michigan Department of Environmental Quality (MDEQ). Plaintiff's grant required her to conduct research, inventory environmental contamination, if any, in defendant's area, and create a plan that might garner more grant money for cleanup efforts. While the grant required her to report any violations of environmental laws to the MDEQ, she remained in the employ of defendant and under its authority. According to plaintiff, she unearthed several violations by area dairy farmers, but defendant's board, consisting of local farmers, were displeased when she reported her findings directly to an administrator from the MDEQ rather than limiting her reports to a university department and her board-selected supervisor. According to plaintiff, the supervisor discouraged her from disclosing information regarding a fish kill caused by a farmer's pollution, and when plaintiff insisted on reporting the problem, her supervisor encouraged her to minimize the issue. After plaintiff reported this and other violations to the MDEQ administrator, defendant held two private sessions and terminated her employment. According to the MDEQ administrator, a member of defendant's board admitted that the board was angry at plaintiff for reporting the fish kill.

An entity violates the WPA when it discharges an employee for reporting a violation of a law, rule, or regulation to a department of the state. MCL 15.362; *Henry v Detroit*, 234 Mich App 405, 409-411; 594 NW2d 107 (1999). Plaintiff argues that she presented sufficient evidence to raise a jury question regarding whether defendant discharged her because she

reported violations of environmental laws by farmers to the MDEQ, as the MDEQ grant required. Defendant, in turn, argues that it discharged plaintiff because her volatile and combative attitude poisoned the workplace and discouraged farmers from cooperating with the research and cleanup plan. Plaintiff argues that this was a pretext, and that her discharge was actually based on her willingness to report violations when she found them. While we leave this conclusion to a jury, we agree that plaintiff presented sufficient evidence to create a genuine issue of fact regarding whether the board discharged her for her demeanor or her reports to the MDEQ. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff and defendant both presented evidence that there was an ongoing conflict between plaintiff and the supervisor defendant assigned to her. Plaintiff's testimony indicated that this conflict arose primarily because plaintiff insisted on reporting environmental violations promptly to the MDEQ. Therefore, plaintiff made out a prima facie case that her report of violations caused her discharge. *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002). After presenting this evidence, which indirectly linked her discharge to her reports, the burden shifted to defendant to present a legitimate, non-discriminatory explanation for its actions. *Id.* Plaintiff's supervisor and other defense witnesses testified that plaintiff clashed with her supervisor and with colleagues because of an irascible personality and an inability to accept authority. Nevertheless, plaintiff presented evidence that these issues arose from her reports to the MDEQ, and that her openness with the MDEQ was the primary reason for her discharge. The grant's MDEQ administrator verified that defendant disapproved of plaintiff's decision to report the fish kill to the MDEQ, but acknowledged that the board also cited other reasons for plaintiff's discharge. Plaintiff also refuted the evidence provided by other employees that her work in the office and in the field had stirred up so much controversy and tension. Under these circumstances, plaintiff presented sufficient evidence which, viewed in a light most favorable to her claim, could lead a reasonable jury to conclude that defendant's stated reasons for discharging plaintiff were mere pretexts. *Id.* The trial court improperly resolved all of these factual disputes and credibility questions in defendant's favor. Because plaintiff demonstrated a genuine issue of material fact regarding whether defendant terminated her for reporting violations of environmental laws immediately and directly to the MDEQ, the trial court erred when it granted defendant's motion for summary disposition. MCR 2.116(C)(10).

Moreover, the trial court erroneously found that plaintiff's reports did not qualify as protected behavior because the reports were part of her job description and defendant essentially acted as a branch of the MDEQ. This conclusion is factually and legally flawed. The evidence demonstrated that defendant was often at odds with the MDEQ because it interfered with their goal of voluntary, rather than forced, compliance. Also, plaintiff was an employee of defendant, not the MDEQ. See *Chilingirian v City of Fraser (On Remand)*, 200 Mich App 198, 199-200; 504 NW2d 1 (1993). Simply because plaintiff was charged with compiling an inventory of violations that the MDEQ would eventually receive does not mean that defendant wanted her to report them immediately to the MDEQ and risk farmers' willingness to participate in further inspection and cleanup action which might, in turn, endanger potential grant money. Furthermore, the WPA does not contain an exception for employees who are acting in conformity with other obligations. It would be a serious misapplication of the law to allow an employer to fire an employee for reporting a violation that the employee was duty-bound to

report. Therefore, the trial court erred when it granted defendant summary disposition on plaintiff's WPA claim.

The trial court correctly found, however, that the OMA violations defendant committed did not warrant the remedies plaintiff sought. If a public body takes action during a proceeding that violates the OMA, and the violation impairs the rights of the public, a court has discretion to invalidate the public body's action. MCL 15.270(2); *Morrison v East Lansing*, 255 Mich App 505, 520; 660 NW2d 395 (2003). In this case, however, defendant later put the same issue to a vote in an open meeting and essentially ratified its earlier decision to discharge plaintiff. Under these circumstances, the trial court may not undo the earlier action, MCL 15.270(5), and plaintiff's claim for reinstatement fails. *Willis v Deerfield Twp*, 257 Mich App 541, 554; 669 NW2d 279 (2003). While defendant's later action did not remedy its earlier violation, the trial court correctly found that the board members innocently misunderstood the correct procedure and had since conformed to the OMA. Therefore, the trial court correctly denied plaintiff's claim for injunctive relief, sanctions, and attorney fees. *Id.*; MCL 15.271(4); MCL 15.273. To the extent that plaintiff still seeks full disclosure of the minutes of the closed sessions, the record indicates that these minutes have now been released as completely as possible, so this issue is moot. *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003).

We reverse and remand for trial on plaintiff's WPA claim, but affirm the trial court's resolution of plaintiff's OMA claim. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O'Connell